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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

R. ROTHMANN, J. WAGNER, A. PETERSON, G. VALENTINE, J. O'LOUGHLAN, S. VEAL, B. PETER, S. BAHNSEN, J. ALAVEKIOS, T. CURTIS, J. FERNANDEZ, K. FORISTER, W. BLISS, L. HATHON, S. DEPERSIS, D. DIAZ, C. KELLY, E. REED, W. E. JOHNSON, S. E. LITTLEFORD, R. B. THOMAS, J. WALKER, R. WHITE, and MASTERS, MATES AND PILOTS TRUST FUNDS,
Petitioners,

VS.

M.V. RESOLUTE, *in rem*, and COAST LINE ASSOCIATES, *in personam*, WEST WINDS, INC., NAUTICAL ELECTRIC INC., and SCHOU-GALLIS CO., LTD.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORMAN LEONARD
Counsel of Record

1182 Market Street
San Francisco, CA
Tele: (415) 626-3077
Counsel for Petitioners

Of Counsel
LEONARD & CARDER
RICHARD S. ZUCKERMAN
San Francisco, CA

PROSKAUER, ROSE,
GOETZ & MENDELSOHN
New York, NY

SEHAM, KLEIN & ZELMAN
New York, NY

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTIONS PRESENTED

1. Does the employment of seamen aboard a vessel create a preferred maritime lien for the contributions the shipowner is contractually required to make as a result of such maritime employment to the seamen's collectively-bargained and jointly-administered pension, welfare, vacation and training funds?

2. Are the contributions which the shipowner is contractually required to make as a result of the seamen's employment aboard the vessel compensation for their services for which the seamen or their trust funds may assert a preferred maritime lien under the Ship Mortgage Act?

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Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[1]This caption of the case contains the names of all of the parties to the proceeding in the court below except the M.V. Pvt. Peters, which is not involved in this petition. U.S. Sup. Ct. Rule 21.1(b), 28 U.S.C.

Petitioners, R. Rothmann and the other individuals whose names are listed in the caption hereof and the Masters, Mates and Pilots Trust Funds, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceedings on November 21, 1983.

OPINION BELOW

The opinion of the Court of Appeals is reported at 720 F.2d 1097 and is printed in Appendix A. The Order of the Court of Appeals denying a rehearing is printed in Appendix B. The unreported Memorandum and Order of the District Court is printed in Appendix C.

JURISDICTION

The opinion of the Court of Appeals was filed and entered on November 21, 1983 and its order denying petitioners' timely petition for rehearing was filed and entered on February 10, 1984. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTES INVOLVED

This case involves, in addition to questions of maritime lien priorities under historic admiralty precepts, the interpretation, construction and application of the Ship Mortgage Act of 1920, section 30, sub-section M, 46 U.S.C. 953 (1976) which declares that a lien "for wages of the crew of the vessel" is a "preferred maritime lien" having priority over all other liens. That statute is printed in Appendix D.

STATEMENT OF THE CASE

Petitioners are individual seamen and the Trust Funds created as a result of collective bargaining between the employers of the seamen and the International Organization of Masters, Mates and Pilots (MMP), a labor organization which represents the seamen. The Trust Funds provide

pension, welfare, vacation, training and similar benefits to the seamen and are financed by employer contributions in accordance with the collective bargaining agreements between the employers and MMP.

The facts out of which this case arose are correctly stated by the Court of Appeals:

> West Winds, Inc., Nautical Electric, Inc., and Schou-Gallis Co., Ltd., filed an admiralty complaint against the M/V RESOLUTE, *in rem*, and Coast Line Associates, the owner and operator of the vessel, *in personam*, under 46 U.S.C. § 971 (1976), to recover the costs of repairs, supplies, and other necessaries furnished to the vessel. The 23 seamen appellants were employed by Coast Line Associates between January and June 1982. Under the provisions of its collective bargaining agreement with the International Organization of Masters, Mates and Pilots, Coast Line was required to contribute to trust funds that provide health, retirement, pension, training, vacation, and similar benefits to the seamen. Coast Line failed to make the contributions for the 23 seamen as required by the collective bargaining agreement. To protect their interest in procuring the payment of the delinquent trust fund contributions, the trustees and the seamen sought to intervene of right in the underlying action under Fed. R. Civ. P. 24(a)(2). 720 F.2d at 1098; Apendix A, p. A-2.

In their complaint, petitioners alleged that the seamen's employment as crew members aboard the M.V. Resolute generated an obligation on the part of respondent Coast Line Associates, the owner and operator of the vessel, to "make contributions in the nature of wages to [the] . . . trust funds for the benefit of [petitioner crew members]" and that such contributions "in the nature of wages" in the total sum of

$83,410.83 were not made and were due and owing to the trust funds.[2]

The basis for invoking the admiralty and maritime jurisdiction of the District Court was the Acts of June 25, 1948, c. 646, 62 Stat. 931 and May 24, 1949, c. 139 § 79, 63 Stat. 101, codified in 28 U.S.C. 1333, and Fed. Rules Civ. Proc., Rule 9(h), 28 U.S.C.

The District Court denied petitioners' motion to intervene. It held, solely in reliance upon *Long Island Tankers Corp. v. S.S. Kaimana*, 265 F.Supp. 723 (N.D. Calif. 1967) (*Long Island Tankers*), that a claim that a ship owner owes contributions to seamen's benefit funds does not entitle either the seamen or the funds to a preferred maritime lien against the vessel upon which the seamen rendered maritime services. It concluded that therefore petitioners could not claim an interest in the action as required for intervention under Fed. Rules Civ. Proc., Rule 24(a), 28 U.S.C.; Appendix C, p. A-17.

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[2]Had the District Court granted the motion to intervene and permitted the development of a factual record, petitioners would have demonstrated a pattern of collective bargaining whereby the employers agree to pay a certain amount of money which is thereupon divided up between "direct wages" and pension, welfare, vacation and similar contributions for seamen benefits. Thus, petitioners would have proven that contributions to the various funds are part of the total wage package. To the extent that monies are paid to the funds, an equal amount is subtracted from wage increases.

It was not necessary to plead the above "facts" or "evidence" in the proposed complaint-in-intervention. The proposed complaint fully satisfied the "notice" requirements of Fed. Rules Civ. Proc., Rule 8, 28 U.S.C. All that is required is "a short and plain statement of the claim that will give the respondents fair notice of what the petitioner's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). See 2A, Moore's Federal Practice, ¶ 8.13. The proposed complaint certainly gave respondents fair notice of the claims asserted so that they could answer and prepare for trial. No one has contended to the contrary.

The Court of Appeals stated that "[t]he sole issue on appeal is whether contributions to trust funds created for the benefit of the employees are 'wages of crew' that may serve as a preferred maritime lien under 46 U.S.C. § 953 (1976)". 720 F.2d at 1098; Appendix A, p. A-2.

Actually, the issue is somewhat different. This case deals with *crew members*, not with employees generally. The issue is whether maritime employment of seamen creates a preferred maritime lien for contributions the shipowner is contractually required to make to the seamen's benefit funds as a result of such employment. The ultimate question here presented is: Which shall have prior access to the limited funds available on the forced sale of a vessel, the trust funds created for the benefit of the crew members or the general creditors of the vessel.[2]

The Court of Appeals affirmed the decision of the District Court solely because it was "compelled by precedent in this circuit" to do so, 720 F.2d 1098; Appendix A, p. A-2. The "precedent" was its earlier *per curiam* affirmance of *Long Island Tankers.* (*Cross v. S.S. Kaimana,* 401 F.2d 182 [9th Cir. 1968] *cert. den.* 393 U.S. 1095 [1969]).

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case because the Court of Appeals has decided two important questions of federal law which have not been, but should be decided by this Court:

(a) whether contributions required by collective bargaining contracts to be made to trust funds created for the benefit of crew members are wages of the crew for maritime lien purposes pursuant to the Ship Mortgage Act;

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[2]The vessel has been sold and the proceeds of the sale are in the custody of the Clerk of the District Court. Therefore this case does not involve any bankruptcy "rehabilitation" issue such as was presented in *National Labor Relations Board v. Bildisco & Bildisco,* ... U.S. ..., 79 L.Ed.2d 482 (1984).

(b) whether under general admiralty and maritime law the employment of seamen creates a preferred maritime lien for contributions which the shipowner, as a result of such employment, is required to make to the seamen's benefit funds.

1. The Importance of the Questions Presented

This case thus presents "a seemingly significant question of admiralty law" warranting the grant of certoriari. (*Morales v. Galveston*, 370 U.S. 165, 167 (1962)). The resolution of this question can be expected to have a great impact on collective bargaining in the maritime industry and upon the rights of tens of thousands of American seamen.[4] It also presents a question of statutory interpretation important in the administration of the relevant statute, which is further warrant for granting the writ. *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 116 (1962). See also *Salem v. United States Lines*, 370 U.S. 31, 32 (1962); *Czaplicki v. S.S. Hoegh Silvercloud*, 351 U.S. 525, 528 (1956).

2. The Historical Lien Priority of Seamen's Wages in Admiralty Law

The priority of the lien for seamen's compensation, expressed in the Ship Mortgage Act as "wages of the crew", is deeply rooted in maritime history. Because of the seaman's need for special protection he has been deemed a ward of admiralty and his wages, ". . . according to the favorite saying of Lord Stowell and Mr. Justice Storey, are sacred liens, and as long as a plank of the ship remains the sailor is entitled, *against all other persons*,

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[4]According to information received from the MARITIME INSTITUTE FOR RESEARCH AND INDUSTRIAL DEVELOPMENT, compiled from data prepared by the MARITIME ADMINISTRATION, there are approximately 60,000 American seamen covered by collectively-bargained employee benefit plans.

to the proceeds as a security for his wages." *The John G. Stevens*, 170 U.S. 113, 119 (1898) (emphasis supplied).

> There are several reasons for this "sacred lien". The ship may be the only valuable security on which the seaman can rely. The seaman is the traditional ward of the admiralty court. *Finally, without the seaman's efforts in bringing the ship safely to port, there would be no res against which other creditors could assert claims.*

International Paint Co. Inc., v. M/V Mission Viking, 637 F.2d 382, 385 (5th Cir. 1981) (emphasis supplied).

That is, of course, true here. If petitioners-crew members had not brought the *Resolute* into port, there would have been no *res* against which West Winds, Inc. or any of the other complainants-respondents could have asserted their claims.

3. The Broad Scope of the Term "Wages of the Crew" in Admiralty Law and under the Ship Mortgage Act

Admiralty courts have traditionally taken a broad view of what constitutes seamen's compensation. Maritime compensation includes not only the wages provided for in the ship's articles, but such items as maintenance and cure (*Pratt v. United States*, 340 F.2d 174, 179 n.11 [1st Cir. 1964]; *Crabtree v. S.S. Julia*, 290 F.2d 478 [5th Cir. 1961] [reversing an order denying intervention to assert a claim for maintenance and cure]; cf. *Pacific SS Co. v. Peterson*, 278 U.S. 130 137 [1928]); reasonable allowances for time and service (*Putnam v. Lower*, 236 F.2d 561 [9th Cir. 1956]); bonuses (*Williams v. Great Lakes Dredge & Dock Co.*, 726 F.2d 278 [6th Cir. 1984]; *Glandzis v. Callinicos*, 140 F.2d 111 [2d Cir. 1944]; *Lakos v. Saliaris*, 116 F.2d 440 [4th Cir. 1940]; *The Herbert L. Rawding*, 55 F.Supp. 156 [E.D. S.C. 1944]); travel allowances (*Williams v. Great Lakes Dredge & Dock Co., supra*).

Indeed, as the instant Court of Appeals acknowledged:

> Wages of seamen are given such a protected status that the owner of a vessel delinquent in paying wages is liable for double the amount owed to the seaman. See 46 U.S.C. § 596 (1976). That penalty payment has itself long been treated as wages of the crew for the purposes of the assertion of a preferred maritime lien under 46 U.S.C. § 953. *See, e.g., Collie v. Fergusson*, 281 U.S. 52, 54, 50 S.Ct. 189, 190, 74 L.Ed. 696 (1930); *Gerber v. Spencer*, 278 F. 886, 889 (9th Cir. (1922).

720 F.2d at 1102, n.4; Appendix A, p. A-13, n.4.
See, also, *Williams v. Great Lakes Dredge & Dock Co., supra.*

The District Court whose decision in *Long Island Tankers* was the basis of the instant holding itself recognized that

> Admiralty courts have not limited the seaman's lien claim to those for ordinary wages. On the contrary, the Courts have recognized the seaman's lien claim for *compensation for maritime services regardless of the form of the compensation* provided only that the claim is reducible to money. See Harden v. Gordon, 11 Fed. Cas. p. 480, No. 6,047 (C.C. Me. 1823). From the earliest period of maritime commerce the test in admiralty courts for determining whether there is a seaman's wage lien has been: Has a maritime service been performed? If such service has been performed, then *whatever constitutes the compensation for the service, if reducible to money, may be enforced by a maritime lien against the vessel upon which those services were performed.* (emphasis supplied)

265 F.Supp. at 726.[3]

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[3]Despite this, the *Long Island Tankers* court denied preferred maritime lien status to seamen's benefit funds contributions for reasons which, as this petition demonstrates, are unsound.

4. Contributions to Seamen's Trust Funds as "Wages of the Crew"

Given the foregoing considerations, the Court of Appeals recognized that there were "compelling reasons why employer contributions to trust funds should be afforded some form of priority treatment for maritime lien purposes." 720 F.2d at 1102, Appendix A, p. A-12.

It acknowledged that "[d]emands for contributions to trust funds providing benefits to employees increasingly serve as substitute for wage demands in collective bargaining negotiations", that "[f]or this reason alone contributions to seamen's trust funds would warrant some form of priority treatment similar to that afforded to 'wages of the crew' " and that "affording priority treatment to trust fund contributions would further the purpose of the preferred maritime lien to protect the *compensation* given seamen" *Ibid.* at 1102, Appendix A, p. A-12-13. (Emphasis supplied.)

Finally, the Court of Appeals recognized that there is "an anomaly in the fact that money given by an employer directly to an employee to spend on benefits is treated as 'wages', but the same funds, if given to trust funds that bestows identical benefits upon the employees, are not", *Ibid.* at 1103, Appendix A, p. A-13.[6]

Nonetheless, because it felt "compelled" to do so by *Long Island Tankers,* the Court of Appeals held that the contributions in issue were not to be given priority status. It held that since the seamen had not alleged that the failure to

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[6]According to industry sources employee benefits as a percentage of payroll in American industry grew from 25.5% in 1961 to 41.2% in 1981. EMPLOYEE BENEFITS, 1981, Survey Research Center, Economic Policy Division, Chamber of Commerce of the United States, p.27. The number of workers covered by private pension plans increased from some 2.7 million in 1930 to 38.4 million in 1975. PENSION FACTS, American Council of Life Insurance, Information, Reference and Statistical Sources, 1981 pages 33-35.

make the trust fund contributions resulted in a loss of benefits, they fell within the *Long Island Tankers* rule.

The Court of Appeals then "reserve[d] to another day the question whether seamen may assert a preferred maritime lien for loss of benefits caused by the employer's failure to make contributions." 720 F.2d at 1099; Appendix A, p. A-5.

In both its holding and its "reservation" the Court of Appeals, as we show in the next section of this petition, was plainly wrong.

5. Failure to Make Contributions to Seamen's Benefit Funds as Loss of Benefits to the Seamen

Any distinction between a loss of contributions owed the seamen's Funds and a loss of benefits due the seamen is illusory. Both represent losses in compensation owed seamen for maritime services performed. Accordingly, the focus should be not on individual seamen and their loss of benefits but on the loss to the Funds, which are a pool of compensation created for the benefit of all participating seamen by virtue of their services to the employing shipping companies.

In *Tuvia Convalescent Center v. National Union*, 717 F.2d 726 (2d Cir. 1983), the court held that an employer could not maintain an action against employee trust funds under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1976). The court reasoned that Section 301(b), which provides that a judgment against a labor organization shall not be enforceable against individual members, barred the employer's action because "*a judgment against the Funds would effectively be a judgment against the individual members of the union that the Funds benefit.*" (at 731; emphasis supplied). See also *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960) (section 301(b) serves to protect beneficiaries of employee welfare

trust funds by providing that the union, and not its members, should be the sole source of recovery).

By analogy, it is clear that a loss of contributions sustained by the Trust Funds is effectively a loss of compensation justly owed to seamen whom the Funds benefit. The fact that seamen in a given case cannot claim a current loss of benefits due to a given employer's failure to make required contributions is not determinative. The employer's failure to make contributions decreases the value of the funds. It thereby increases the likelihood that seamen-petitioners will fail to receive their benefits, thus depriving them of compensation for the maritime services rendered to respondent-shipowner.

Moreover, with respect to one of the funds involved in this case, the Masters, Mates and Pilots Individual Retirement Account Plan (I.R.A.P.), the loss of contributions has directly resulted in a loss of deferred wages to the individual crew members.

The I.R.A.P. is a defined contribution Plan. It provides that each shipping company shall pay to the Plan, for the direct benefit of each of its crew members, an amount equal to a stipulated percentage of each seaman's base wages. With respect to the licensed seamen employed by Coast Line Associates, the amount was 5% of base wages; for the unlicensed seamen it was 10%. Each such 5% or 10% paid is directly credited to the seaman's account, and an annual printout is sent to him from the Fund, indicating the total amount in his accrued account. When a shipping company does not make such payment, as is the case here with respect to Coast Line Associates, the seaman's account suffers a loss of the moneys due. The other shipping companies which are also contributors to I.R.A.P. for the benefit of their crew members do not make

payments to cover the losses sustained by any seaman whose own company fails to make its I.R.A.P. payments.[7]

In order to protect the vitality of seamen's fringe benefit funds, this Court should allow the maritime lien to attach at the time the delinquency occurs. Such judicial protection will afford seamen the priority sanctioned by admiralty law and by the policy of the Ship Mortgage Act. Seamen should not be called upon to wait until the funds have become so depleted by an employer's failure to make contributions that a "loss of benefits" to the seamen will not be recoverable.[8]

6. This Court May and Should Re-examine the Holding Below

Petitioners submit that whatever may be the validity of the Court of Appeals' conclusion that *Long Island Tankers*

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[7]The Court of Appeals itself had previously ruled that contributions to vacation funds (and the MMP Vacation Fund is also one of the petitioners here) were entitled to "priority status as wages" under the pre-1978 Bankruptcy Act. *In re E.V. Moore of California, Inc.*, 447 F.2d 1106 (9th Cir.) *cert. denied, sub. nom., Bowman v. Bay Area Painters Trust Fund*, 404 U.S. 995 (1971). See also *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768 (1962). But it refused so to read the Ship Mortgage Act because of *Long Island Tankers* and *Barnouw v. S.S. Ozark*, 304 F.2d 717 (5 Cir. 1962); 720 F.2d at 1101; Appendix A, p. A.9.

Barnouw relied exclusively upon *Brandon v. S.S. Denton*, 302 F.2d 404 (5 Cir. 1962) which went off on the rather strange proposition that contributions to seamen's benefit funds "must be considered also as made for the best interests of the employer rather than as a part of the seamen's wages". 302 F.2d at 416.

[8]Coast Line Associates is not alone in becoming delinquent to the MM&P Trust Funds. The court is respectfully requested to take judicial notice of the recent bankruptcies of two large shipping companies on the West Coast—Pacific Far East Lines (Ninth Circuit Case No. 82-4039) and States Steamship Company (Ninth Circuit Case Nos. 82-4224, 82-4225, 82-4105) and of the bankruptcy of

"compelled" it to reach the result below,[9] this Court is not so bound.[10] It is free to, and should, examine the issues posed by this petition. We therefore examine the problem *de novo*.

As already noted, supra page 7, there are two questions involved in determining whether there is a basis for a seamen's lien: Was a maritime service been performed? Is the compensation for that service reducible to money? Each of these questions can be answered only in the affirmative in this case.

First, it is the maritime service performed by the individual petitioners, the crew members, which gave rise to the obligation to make contributions to the Trust Funds. Depending on the terms governing the particular Fund, contributions are based on either the number of hours for which a crew member is entitled to pay or a percentage of the wages paid for hours worked. If there is no maritime service performed, no contributions are due.

Waterman Steamship Company on the East Coast (Southern District of New York, No. 83-B-11732-HCB). Cf. *National Labor Relations Board v. Bildisco & Bildisco*, ... U.S. ..., 79 L.Ed.2d 482, 510 n.16 (1984) (Brennan, J., concurring and dissenting).

We are advised by Martin E. Segal Company, the Funds' actuaries, that the actuarial present value of the MMP Pension Fund's accumulated benefits as of January 1, 1983 was in excess of $280,000,000.00. If individual shipping companies fail to make their contributions, this sum may never be realized, so that the individual crew members will indeed suffer a "loss of benefits".

[9]The Court of Appeals considered, but rejected, petitioners' argument that *Long Island Tankers* was distinguishable because in this case, unlike *Long Island Tankers*, the seamen themselves—the direct beneficiaries of the Trust Funds—are parties to the suit. 720 F.2d 1099; Appendix A, p. A-5.

[10]This Court's denial of certiorari in *Long Island Tankers* was not, of course, a reflection of its views on the merits. *United States v. Carver*, 260 U.S. 482, 490 (1923).

Second, compensation for these services in the form of contributions is clearly reducible to money—indeed the amount of contributions per man hour of maritime services or as a percentage of wages earned is specified in the collective bargaining contract.

It is now universally recognized that such trust fund contributions are "an important part of the employee's total compensation" (*Duncan-Harrelson Company v. Director*, 686 F.2d 1336, 1345 [9th Cir. 1982, vacated and remanded on other grounds for reconsideration in the light of *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. ....., 76 L.Ed.2d 194 (1983), ... U.S. ....., 77 L.Ed. 2d 1329]) and are "in reality, indirect or deferred compensation, earned by the employee with each hour or day worked". *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457, 464, (3d Cir. 1978) (Adams, J. concurring) *cert. den.* 442 U.S. 918 (1979).

The beneficiaries of such contributions are the maritime employees—the crew members.

> The funds are no more than a channel; they are merely a means by which the company provides life insurance, health insurance, investment benefits and career training for its employees. *Hilyer v. Morrison-Knudsen Construction Co.*, 670 F.2d 208, 211 (D.C. Cir. 1981) reversed on other grounds, *sub nom. Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. ....., 76 L.Ed.2d 194 (1983).

7. This Court's Decision in Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. ....., 76 L.Ed.2d 194 (1983) Is Not Controlling

Morrison-Knudsen was reversed and vacated by this Court because of its construction of section 2(13) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 902 (13).

It must be noted at the very outset that *Morrison-Knudsen* did not involve the employer's failure to make the required contributions to trust funds. The contributions had been made and the question was whether they fell within the statutory definition of wages of shoreside workers for the purpose of computing compensation benefits. In deciding that they did not, this Court did not disagree with the foregoing analysis of trust fund contributions. Indeed it found that "[t]here is force to this argument" 461 U.S. ....., 76 L.Ed.2d at 203.

Even after *Morrison-Knudsen* this Court recognized that

> There is no question . . . that retirement benefits constitute a form of 'compensation'. *Arizona Governing Committee v. Norris*, ... U.S. ....., 77 L.Ed.2d 1236, 1245 (1983).

And that is what we are dealing with in this case: seamen's *compensation* for maritime services rendered.

The determination of whether contributions already made to shoreside workers' trust funds were to be treated as wages for workers' compensation purposes presented this Court with entirely different considerations from those involved in determining maritime lien claim priorities in the case of a shipowner which failed to make contributions to the Trust Funds established to benefit seamen. Since the compensation statute involved in *Morrison-Knudsen* specifically excluded seamen from its coverage,[11] maritime and admiralty considerations such as are presented by the instant case were plainly not involved there.

In *Morrison-Knudsen* the question was whether contributions to non-maritime workers' trust funds are a

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[11] "The term 'employee' . . . does not include a master or member of a crew of any vessel . . ." Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C. § 902(3).

"similar advantage" to "board, rent, housing or lodging" within the meaning of § 2(13) of the Longshore & Harbor Workers Compensation Act, 33 U.S.C. § 902(13). This Court held that such contributions were not a similar advantage because, while board, rent, housing or lodging "are benefits with a present value that can readily be converted into a cash equivalent on the basis of their market values[,] [t]he present value of these trust funds is not, however, so ea ily converted into a cash equivalent" 461 U.S. ....., 76 L.Ed.2d at 199.

While it may be necessary in a workers' compensation case to convert the value of the trust funds to cash equivalents if they are to be treated as wages for the purpose of computing compensation benefits under the Longshore Act, such a conversion is not necessary here. Petitioners do not request that the value of the Trust Funds be translated into a cash equivalent and be now awarded to the seamen. Rather, they simply seek payment to the Funds of the agreed-upon contributions which were due as part of the compensation for the maritime services that had been rendered, and which the shipowner respondent has failed to make. There is no uncertainty about the dollar amount of those contributions. There is no need to "convert" the contributions to anything else. The only thing sought is that the contributions be made in the precise amounts and in the precise manner agreed upon.

Thus the underlying premise upon which *Morrison-Knudsen* was based is absent in this case.

This Court also noted that the structure of the Longshoremen's Compensation Act lent further support to the conclusion reached in *Morrison-Knudsen*. Since that Act contained provisions requiring the Secretary of Labor to determine "the national average weekly wage" in fixing minimum and maximum levels of compensation benefits, the inclusion of fringe benefit contributions as part of "wages"

would require the Secretary "to evaluate the provisions of collective bargaining agreements throughout the nation".

> Any attempt to make this determination on a national basis would involve deciding which benefits to include, a subject on which different branches of the government differ . . . It would also require deciding how the benefits should be evaluated. Evaluating benefits is not simple in "defined contribution" plans . . . ; in "defined benefit" plans, where the employer's costs are actuarially determined to provide a certain level of service, the calculation is infinitely harder . . . Without clear indication from Congress that this approach with its attendant problems is required, we decline to adopt it.

461 U.S. ....., 76 L.Ed.2d at 202.

None of these problems are present in the instant case. The District Court was not called upon to evaluate the benefits which crew member-petitioners would ultimately receive from the Funds. It was asked only to determine that the agreed upon and already fixed contributions to the Funds, which resulted from the crew members' maritime employment, were entitled to a priority over the claims of the vessel's general creditors. No evaluation of benefits is involved here.

Finally, in *Morrison-Knudsen* this Court emphasized the fact that the Longshore and Harbor Workers Compensation Act

> was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accepted the limited recovery

> because they receive prompt relief without the expense, uncertainty and delay that tort actions entail

461 U.S. ....., 76 L.Ed.2d at 203.

This Court held that, in those circumstances, to treat trust fund contributions as wages "would significantly alter the balance achieved by Congress." 461 U.S. ....., 76 L.Ed.2d at 203.

No such considerations are present here. The maritime and admiralty law which give to seamen's compensation a preferred maritime lien and the Ship Mortgage Act which confirmed that lien were not designed to strike any such balance. On the contrary, the statute's purpose was to codify the admiralty law and practice that gave such wages a priority over all other claims. There was no compromise struck between the general creditors of the vessel on the one hand and crew members on the other. Crew members were given a clear priority. The effect of the decision below, however, is to prefer general creditors over seamen —a position directly contrary to traditional maritime law and to the objectives of the Ship Mortgage Act.

8. This Court Has the Power and Responsibility to Fashion Controlling Rules of Admirality and Maritime Law

Finally, the Court of Appeals here suggested that

> . . . Congress may, as it did in enacting the Bankruptcy Reform Act, wish to "recognize[ ] the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands." S.Rep. No. 989, 95th Cong., 2d Sess. 69 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5855.[8] Significant changes in economic conditions suggest the inadequacies of the present debt priorities in the Ship Mortgage Act—priorities that have not been changed since the Act was originally adopted in 1920. Amending 46 U.S.C. § 953

to bring the lien priorities in line with modern economic reality would further the purpose of the section and avoid anomalous results.

> "In making this suggestion, we recognize that "[o]ne of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions." G. Gilmore, *supra*, at 95; *see* Phelps, *supra*, at 469.

720 F.2d at 1103, Appendix A, p. A-13-14 (footnote in original).

It is submitted that the Court of Appeals misinterpreted the applicable maritime law and the Ship Mortgage Act. Nothing in that Act compels a holding that contributions to trust funds established for the benefit of crew members are not to be treated as wages for maritime lien priority purposes. And the maritime law, as has been pointed out, recognizes as seamen's wages any form of compensation so long as it is reducible to money—as these contributions are.

There are no "inadequacies" in the present priorities of the Ship Mortgage Act. That Act makes crew wages a preferred maritime lien which is "superior to everything else" (S.Rep. No. 573, 66th Cong. 2d Sess. 9 [1920]) and in so doing merely confirms the general maritime law.

Furthermore, as this Court has said:

> Article 3 of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so. *Fitzgerald v. United States Lines*, 374 U.S. 16, 20-21 (1963).

See also: *Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979) ("Admiralty law is judge-made law to a great extent").[12]

CONCLUSION

This case presents important questions for American seamen and their benefit funds. It concerns significant questions regarding the lien priority of claims for seamen's compensation and the interpretation of the Ship Mortgage Act.

To resolve those questions the writ should be granted.

San Francisco, California
April 16, 1984

Respectfully submitted,

NORMAN LEONARD
Counsel of Record

LEONARD & CARDER
RICHARD S. ZUCKERMAN
PROSKAUER, ROSE, GOETZ & MENDELSOHN
SEHAM, KLEIN & ZELMAN
Of Counsel

(Appendices follow)

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[12]The Fifth Circuit, noting the "admiralty court's protective attitude toward seamen", has observed that

> The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional rule.

Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057, 1063 (5th Cir. 1981) (footnote omitted).

APPENDIX

Appendix A

West Winds, Inc., Nautical Electric, Inc., and Schou-Gallis Co., Ltd., Plaintiffs-Appellees,

and

R. Rothmann, J. Wagner, A. Patterson, G. Valentine, J. O'Laughlan, S. Veal, et al., Applicants-in-Intervention-Appellants,

vs.

M.V. Resolute, and M.V. Pvt. Peters,[1] in rem, and Coast Line Associates, in personam, Defendants-Appellees,

and

Coast Line Associates, Claimant-Appellee.

No. 82-4717.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 13, 1983.

Decided Nov. 21, 1983.

Appeal from the United States District Court for the Northern District of California.

Before ALARCON, CANBY, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Appellants are 23 seamen and the trustees of their union's trust funds whose motion to intervene of right

[1]The M. V. Pvt. Peters is not involved in this petition. [Our footnote].

under Fed.R.Civ.P. 24(a)(2) was denied by the district court. The sole issue on appeal is whether contributions to trust funds created for the benefit of the employees are "wages of the crew" that may serve as the basis for a preferred maritime lien under 46 U.S.C. § 953 (1976). We are compelled by precedent in this circuit to hold that they are not, at least in the absence of a loss of benefits. Accordingly, we affirm the district court's denial of the motion to intervene.

West Winds, Inc., Nautical Electric, Inc., and Schou-Gallis Co., Ltd., filed an admiralty complaint against the M/V RESOLUTE, *in rem*, and Coast Line Associates, the owner and operator of the vessel, *in personam*, under 46 U.S.C. § 971 (1976), to recover the costs of repairs, supplies, and other necessaries furnished to the vessel. The 23 seamen appellants were employed by Coast Line Associates between January and June 1982. Under the provisions of its collective bargaining agreement with the International Organization of Masters, Mates and Pilots, Coast Line was required to contribute to trust funds that provide health, retirement, pension, training, vacation, and similar benefits to the seamen. Coast Line failed to make the contributions for the 23 seamen as required by the collective bargaining agreement. To protect their interest in procuring the payment of the delinquent trust fund contributions, the trustees and the seamen sought to intervene of right in the underlying action under Fed.R.Civ.P. 24(a)(2).

Appellants claim that the delinquencies give rise to a preferred maritime lien as "wages of the crew" under the Ship Mortgage Act of 1920, section 30, subsection M, 46 U.S.C. § 953 (1976). Under the Act, "a lien for . . . wages of the crew of the vessel" is a "preferred maritime lien"

that has priority over all other claims and may be asserted in any *in rem* proceeding brought against a vessel. *Id.* Appellants maintain that, because contributions to the trust funds are a form of compensation, they should be treated as "wages of the crew." They do not allege, however, that the failure to make contributions has caused or will cause any loss of benefits.

The district court issued a memorandum and order denying appellants' motion to intervene. Relying upon *Long Island Tankers Corp. v. S.S. Kaimana*, 265 F.Supp. 723 (N.D.Cal.1967), the district court held that the delinquent trust fund contributions were not "wages of the crew" for purposes of section 953 and that therefore there was no basis for the assertion of a preferred maritime lien. Accordingly, the district court held that the applicants-in-intervention did not allege "an interest relating to the property or transaction which is the subject of the action" as required for intervention of right under Fed.R.Civ.P. 24 (a)(2).

I

Intervention of right under Fed.R.Civ.P. 24(a)(2):

> requires a timely showing that the applicant possesses an interest relating to the property or transaction which is the subject of the suit and is so situated that the disposition of the suit may as a practical matter impair the ability to protect that interest, and in addition that the applicant's interest is not adequately represented by the existing parties.

State of Idaho v. Freeman, 625 F.2d 886, 887 (9th Cir. 1980) (citations omitted); *see Sagebrush Rebellion, Inc. v.*

Watt, 713 F.2d 525, 527 (9th Cir.1983); *Smith v. Pangilinan*, 651 F.2d 1320, 1323-25 (9th Cir.1981); *Blake v. Pallan*, 554 F.2d 947, 951-55 (9th Cir.1977). Denial of a motion to intervene of right is a final order and therefore appealable under 28 U.S.C. § 1291 (1976). *See Sagebrush Rebellion*, 713 F.2d at 527; *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir.1980) (citing *Blake v. Pallan*, 554 F.2d at 951 n. 5). Because we agree with the district court that applicants-in-intervention do not possess a cognizable interest under 46 U.S.C. § 953, we need not decide whether the other requirements of Rule 24(a)(2) are met.

II

As appellees argue, there is Ninth Circuit precedent directly on point in this case. In *Cross v. S.S. Kaimana*, 401 F.2d 182 (9th Cir.1968) (per curiam), *cert. denied*, 393 U.S. 1095, 89 S.Ct. 879, 21 L.Ed.2d 785 (1969), in a one sentence opinion, we adopted the reasoning of the district court and held that contributions of employers to trust funds created pursuant to collective bargaining agreements to provide vacation, pension, and welfare benefits to seamen do not constitute "wages of the crew" under 46 U.S.C. § 953. The district court decision, *Long Island Tankers Corp. v. S.S. Kaimana*, 265 F.Supp. 723 (N.D.Cal.1967), affirmed in *Cross*, addressed a factual situation strikingly similar to the one before us. In that case, as here, the employers were required to make contributions to the trust funds based upon the number of days and type of work performed by their employees. In *Long Island Tankers*, after several employers failed to make contributions the trustees of the funds brought an action seeking to assert preferred maritime liens to recover the contributions as "wages of the

crew" under 46 U.S.C. § 953. The district court dismissed the action and held that the contributions were not "wages of the crew" that could serve as the basis of the trustees' assertion of preferred maritime liens. *See* 265 F.Supp. at 726-27.

Appellants contend that we should distinguish *Long Island Tankers* because seamen, as well as trustees of the trust funds, seek to assert the lien here. We decline to do so. Appellants correctly assert that *Long Island Tankers* reserved a question regarding the right of seamen to assert a preferred maritime lien. The question reserved, however, was only whether seamen could assert a preferred maritime lien for a *loss of benefits* caused by an employer's failure to make trust fund contributions. 265 F.Supp. at 727-28. The court did not reserve the question whether seamen could assert a preferred maritime lien for a failure to make contributions when no accompanying loss of benefits was claimed. In reserving the question it did, the court expressly relied on the distinction between contributions that merely serve to fund benefits and the benefits themselves. *Id.* at 727-29. Because the seamen here do not allege any loss of benefits due to Coast Line's failure to make the trust fund contributions, we hold that they fall within the rule established in *Long Island Tankers.* However, like the court in that case, we reserve to another day the question whether seamen may assert a preferred maritime lien for a loss of benefits caused by an employer's failure to make contributions.

Appellants challenge the present-day validity of the reasoning of *Long Island Tankers.* In *Long Island Tankers* the court relied heavily upon the Supreme Court's decision

in *United States v. Embassy Restaurant, Inc.* 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1959). *Embassy Restaurant* held that employer contributions to trust funds were not entitled to priority over other debts as "wages . . . due to workmen" under the Bankruptcy Act. *See* 359 U.S. at 35, 79 S.Ct. at 558. Claiming that *Embassy Restaurant* was "overruled" by Congress in the Bankruptcy Reform Act, Pub.L. No. 95-598 § 507, 92 Stat. 2549, 2583-85 (1978), appellants argue that *Long Island Tankers* is no longer good law. We disagree.

In the Bankruptcy Reform Act, Congress placed "contributions to employee benefit plans" immediately below "wages, salaries, or commissions" on the hierarchy of debt priorities in bankruptcy proceedings. *See* 11 U.S.C. § 507 (a)(3), (4). Although the legislative history of 11 U.S.C. § 507(a)(4) states that it "overrules" *Embassy Restaurant, see* S.Rep. No. 989, 95th Cong., 2nd Sess. 69 (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5855, the statement is not entirely accurate. In *Embassy Restaurant*, the Court declined to treat contributions as wages; when Congress adopted the Bankruptcy Reform Act, it, too, refused to treat contributions as wages. Instead, it created a completely new category, with a lesser priority than wages, for such claims. Under the Bankruptcy Reform Act, if there are insufficient funds to pay both wages and contributions, the wages are paid and the contributions are not. This type of lesser priority for contributions was not considered by the *Embassy* Court.

In any event, Congressional action in response to a court's interpretation of a statute may not necessarily indicate disagreement with the court's analysis. *See generally*

1A J. Sutherland, Statutes and Statutory Construction ch. 22 (C. Sands 4th ed. 1972) (discussing judicial treatment of amendments to a statute). In fact, Congressional amendment of a statute may mean that Congress agrees with the court's interpretation of the existing statute, but believes that changed circumstances require amendment. All that can be said with certainty about the fact that a statute has been amended is that the amendment *presumably* changes legal rights under the statute. *See* 1A J. Sutherland, *supra*, § 22.30, at 178-79. Although the Bankruptcy Reform Act changed the priority afforded to claimants like those in *Embassy*, Congress did not "overrule" *Embassy* or even reject its reasoning. *Long Island Tankers* therefore survives as precedent that is binding upon us.

Cross' affirmance of *Long Island Tankers* does not stand alone. Other courts addressing the issue have held that employer contributions to trust funds created to benefit employees are not "wages of the crew" under 46 U.S.C. § 953. *Barnouw v. S.S. Ozark*, 304 F.2d 717, 719-20 (5th Cir.1962); *Brandon v. S.S. Denton*, 302 F.2d 404, 415-16 (5th Cir.1962); *Irving Trust Co. v. The Golden Sail*, 197 F.Supp. 777, 778-79 (D.Or.1961). Moreover, a recent Supreme Court decision defining "wages" under another maritime statute suggests the vitality of the holding in *Long Island Tankers*.

In *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, —— U.S. ——, 103 S.Ct. 2045, 2049, 76 L.Ed.2d 194 (1983), the Supreme Court held that employer contributions to union health, welfare, pensions, and training trust funds are not "wages" for the purpose of computing compensation benefits under section

2(13) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(13)(1976).[1] The Court emphasized that, because contributions are not "benefits with a present value that can be readily converted into a cash equivalent on the basis of their market values," they should not be treated as "wages." 103 S.Ct. at 2049. Rather than constituting benefits convertible to a cash equivalent, contributions generally accumulate in trust funds, which, after investment, finance future benefits that are non-convertible, and may vary according to an employee's needs. *See id.; Long Island Tankers*, 265 F.Supp. at 727.[2]

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[1]Our judgment in *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 686 F.2d 1336 (9th Cir.1982), was vacated and remanded in light of the Supreme Court's decision in *Morrison-Knudsen*. *See* 461 U.S. ——, 103 S.Ct. 2446, 2447, 77 L.Ed.2d 1329 (1983). We subsequently vacated the part of our original decision which held that contributions are "wages" for purposes of the Longshoremen's and Harbor Workers' Compensation Act. *See* 713 F.2d 462 (9th Cir.1983).

[2]In one opinion holding that contributions are "wages of the crew" under section 953, *In re Bulk Food Carriers, Inc.*, No. 3-78-0187 (Bankr.N.D.Cal.1980), a bankruptcy court distinguished *Long Island Tankers* because the collective bargaining agreement before the bankruptcy court did not explicitly state that individual seamen had no right, title, or interest in the employer's contributions. Although some language in *Long Island Tankers*, *see* 265 F.Supp. at 726-27, and in decisions interpreting the debt priorities under the pre-1978 Bankruptcy Act, *see, e.g., Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768 (9th Cir.1962), suggests that the specific language of a collective bargaining agreement may determine whether disputed items are wages or contributions, such distinctions seem inappropriate given the reasoning in *Morrison-Knudsen*. *Morrison-Knudsen* makes it clear that the determinative factor is the general nature of contributions and not the specific nature of collective bargaining provisions covering right or title to the contributions.

Despite *Morrison-Knudsen*, appellants argue that, because contributions to trust funds are increasingly given by employers to employees as a form of compensation, "wages of the crew" should be read to include such contributions. Appellants point out that some courts interpreting other statutes have held that "wages" includes contributions because they are, in fact, part of the total compensation for employment. *See, e.g., W.W. Cross & Co. v. NLRB*, 174 F.2d 875, 877-78 (1st Cir.1949); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir.1948), *cert. denied*, 336 U.S. 960, 69 S.Ct. 887, 93 L.Ed. 1112 (1949); *Dunlop v. Tremayne*, 62 Cal.2d 427, 431, 398 P.2d 774, 777, 42 Cal.Rptr. 438, 441 (1965). Although we are sympathetic to appellants' argument, we are not free to accept it here. Part of the reason lies in certain limits that we perceive to exist with respect to the function of statutory interpretation.

It has long been recognized that:

> increasingly as a statute gains in age . . . its language is called upon to deal with circumstances utterly uncontemplated at the time of its passage. Here the quest is

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In addition, although we have given contributions to vacation funds priority status as wages under the pre-1978 Bankruptcy Act because the amount due an employee is fixed, *see In re E.V. Moore of California, Inc.*, 447 F.2d 1106 (9th Cir.), *cert. denied sub. nom. Bowman v. Bay Area Painters' Trust Fund*, 404 U.S. 995, 92 S.Ct. 535, 30 L.Ed.2d 547 (1971); *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768 (9th Cir.1962), *Long Island Tankers* refused to treat contributions to vacation trust funds as "wages of the crew" under 46 U.S.C. § 953; the Fifth Circuit also has refused to do so. *See Barnouw v. S.S. Ozark*, 304 F.2d 717, 719-20 (5th Cir.1962). Given this authority, the fact that one of the claims is that Coast Line failed to make contributions to vacation trust funds does not permit us to reach a different conclusion with respect to those contributions.

> not properly for the sense originally intended by the statute, for the sense sought originally to be put into it, but rather for the sense which can be *quarried out of it* in the light of the new situation.

Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed,* 3 Vand.L.Rev. 395, 400 (1950) (emphasis in original); *see* H. Hart & A. Sacks, The Legal Process 1410-11 (tent. ed. 1958) (unpublished manuscript). For this reason, generally, a court interpreting a statute should:

> ask itself not only what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present day society. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature.

Phelps, *Factors Influencing Judges in Interpreting Statutes,* 3 Vand.L.Rev. 456, 469 (1950); *see In re Grand Jury Subpoena of Persico,* 522 F.2d 41, 64-65 (2d Cir.1975); *see also* G. Calabresi, A Common Law in the Age of Statutes 163-66 (1982) (suggesting that courts explicitly turn to common law principles to update statutes); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 Harv.L.Rev. 892, 913 (1982) (proposing a "common law model of statutory interpretation" that would allow courts to "view statutes as statements of consensually agreed upon principles").

Despite the general validity of this approach to statutory interpretation, the judiciary is not the proper branch of

government to update complex statutes when legislative decisionmaking is necessary. For example, in the case of the Bankruptcy Reform Act's creation of a new intermediate level of debt priorities covering contributions, Congress was the only branch of government capable of making the necessary change; courts could only decide whether "wages" includes contributions and could not create a new, separate, and lesser priority category. *See* G. Calabresi, *supra*, at 158-62 (recognizing inherent difficulties in courts' updating of detailed and technical statutes); G. Gilmore, The Ages of American Law 96 (1977) ("[T]he more tightly a statute was drafted originally, the more difficult it becomes to adjust the statute to changing conditions without legislative revision." (footnote omitted)). Here, as with the bankruptcy laws, in order to bring the Ship Mortgage Act up to date, it may be necessary to create a new, separate, and lesser priority category for contributions. That, as we have already said, we cannot do.

We must reject appellants' argument for another reason, as well. The Supreme Court recently refused to define "wages" as including contributions in another maritime act despite its recognition of the changes that have occurred in the methods of paying compensation. *See Morrison-Knudsen*, 103 S.Ct. at 2051-53. It did so partly because the legislative history and administrative practice under the Longshoremen's and Harbor Workers' Compensation Act did not reflect an intention to include contributions. *See id.* at 2050-51. In light of this reasoning, we do not believe that we are free to ignore the judicial history of the Ship Mort-

gage Act and *Long Island Tankers* simply because of those same changes.[3]

In conclusion, Ninth Circuit precedent and other persuasive authority, as well as the complexities implicated by a judicial restructuring of lien priorities, compel the conclusion that contributions, at least in the absence of any actual loss of benefits, are not "wages of the crew" under 46 U.S.C. § 953 and therefore cannot serve as the basis for the assertion of a preferred maritime lien.

III

Although we are not free to afford appellants the relief they seek, they have offered compelling reasons why employer contributions to trust funds should be afforded some form of priority treatment for maritime lien purposes.

Demands for contributions to trust funds providing benefits to employees increasingly serve as a substitute for wage demands in collective bargaining negotiations. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 69 (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5855; H.Rep. No. 533, 93d Cong., 2nd Sess. 2-3 (1974), *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 4640-41; *see also* Employee Retirement Income Security Act, Pub.L. No. 93-406, 88 Stat. 829 (1974) (extensively regulating the increasing number of trust funds created pursuant to collective bargaining agree-

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[3]Appellants suggest that this case is distinguishable from *Morrison-Knudsen* because a different statute is involved, because there is no long history of administrative interpretation for this court to rely upon, and because 46 U.S.C. § 953 has not been amended since its enactment in 1920. Such distinctions cannot be determinative, however, when there is clear precedent in this circuit that is contrary to appellants' proposed interpretation.

ments). For this reason alone, contributions to seamen's trust funds would warrant some form of priority treatment similar to that afforded "wages of the crew." Moreover, affording priority treatment to trust fund contributions would further the purpose of the preferred maritime lien—to protect the compensation given seamen. *See* S.Rep. No. 573, 66th Cong., 2nd Sess. 9 (1920).[4] Finally, there is somewhat of an anomaly in the fact that money given by an employer directly to an employee to spend on benefits is treated as "wages," but the same funds, if given to a trust fund that bestows identical benefits upon the employee, are not. *See Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 686 F.2d 1336, 1345 (9th Cir. 1982), *vacated and remanded*, 461 U.S. ——, 103 S.Ct. 2446, 77 L.Ed.2d 1329 (1983).

As these arguments strongly suggest, Congress may, as it did in enacting the Bankruptcy Reform Act, wish to "recognize[] the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands." S. Rep. No. 989, 95th Cong., 2d Sess. 69 (1978), *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5855.[5] Significant

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[4] Wages of seamen are given such a protected status that the owner of a vessel delinquent in paying wages is liable for double the amount owed to the seaman. *See* 46 U.S.C. § 596 (1976). That penalty payment has itself long been treated as "wages of the crew" for the purposes of the assertion of a preferred maritime lien under 46 U.S.C. § 953. *See, e.g., Collie v. Fergusson*, 281 U.S. 52, 54, 50 S.Ct. 189, 190, 74 L.Ed. 696 (1930); *Gerber v. Spencer*, 278 F. 886, 889 (9th Cir.1922).

[5] In making this suggestion, we recognize that "[o]ne of the facts of legislative life . . . is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions." G. Gilmore, *supra*, at 95; *see* Phelps, *supra*, at 469.

changes in economic conditions suggest the inadequacies of the present debt priorities in the Ship Mortgage Act—priorities that have not been changed since the Act was originally adopted in 1920. Amending 46 U.S.C. § 953 to bring the lien priorities in line with modern economic reality would further the purpose of the section and avoid anomalous results.

IV

We conclude that, at least absent any loss of benefits, seamen may not assert a preferred maritime lien for "wages of the crew" under 46 U.S.C. § 953 based on an employer's failure to make contributions to trust funds. Therefore, the district court's denial of appellants' motion to intervene of right is

AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 82-4717
(Northern District, California)
West Winds, Inc., Nautical Electric, Inc., and
Schou-Gallis, Co., Ltd.,
Plaintiffs-Appellees,
and
R. Rothmann, J. Wagner, A. Patterson,
G. Valentine, J. O'Laughlan, S. Veal, et al.,
Applicants-in-Intervention-Appellants,
vs.
M. V. Resolute, and M.V. Pvt Peters, *in rem*, and
Coast Line Associates, *in personam*,
Defendants-Appellees,
and
Coast Line Associates,
Claimant-Appellee.
[Filed Feb. 10, 1984]

ORDER

Before: ALARCON, CANBY, and REINHARDT,
Circuit Judges

The panel as constituted has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California
C 82-2753 SAW
West Winds Incorporated, et al.,
Plaintiffs,

vs.

M/V Resolute, et al.,
Defendants.

MEMORANDUM AND ORDER

Brady-Hamilton Stevedore Co. moves to intervene in this action pursuant to Fed. R. Civ. Pro. 24(a). No party opposes this motion. Because their complaint in intervention asserts that they hold a maritime lien on the M.V. Resolute pursuant to 46 U.S.C. § 971, their motion must be granted. In addition, Brady-Hamilton Stevedore Co. moves the Court to admit Gordon T. Carey, Jr., a member in good standing of the Oregon State Bar, and who has been admitted to the United States District Court for the State of Oregon, to appear pro hac vice in this action. No party opposes this motion. The Court grants this motion pursuant to Northern District of California Local Rule 110-2(b).

R. Rothmann, J. Wagner, A. Peterson, G. Valentine, J. O'Loughlan, S. Veal, B. Peter, S. Bahnsen, J. Alavekios, T. Curtis, J. Fernandez, K. Forister, W. Bliss, L. Hathon, S. DePersis, D. Diaz, C. Kelly, E. Reed, W. E. Johnson, S. E. Littleford, R. B. Thomas, J. Walker, R. White, and Masters, Mates and Pilots Trust Funds also move to intervene in this action. J. Fernandez asserts in support of his

motion that defendant Coastline Associates (hereinafter "defendant") owes him unpaid wages as a result of his serving as a seaman on the M.V. Resolute. This claim, if true, would establish a maritime lien against the M.V. Resolute pursuant to 46 U.S.C. § 953. *Central States v. Old Security Life Insur. Co.*, 600 F.2d 671, 679 (7th Cir. 1979) (nonconclusory allegations supporting a motion to intervene to be taken as true). J. Fernandez must therefore be allowed to intervene in this action to assert his claim against the M.V. Resolute.

Masters, Mates and Pilots Trust Funds, and the other twenty-two seamen listed above, however, fail to allege facts sufficient to establish a maritime lien against the M.V. Resolute. They allege that as a result of defendant's employment of these seamen, defendant owes contributions to various union trust funds pursuant to a collective bargaining agreement between defendant and the International Organization of Masters, Mates and Pilots. This claim does not entitle either the seamen or the trust funds to a preferred maritime lien against the M.V. Resolute. *See* 46 U.S.C. § 953; *Long Island Tankers Corp. v. S.S. Kaimana*, 256 F.Supp. 723, 728-29 (N.D. Cal. 1967). Consequently, they do not claim "an interest relating to the property or transaction which is the subject of the action . . ." Fed. R. Civ. Pro. 24(a). Their motion to intervene must therefore be denied. Accordingly,

IT IS HEREBY ORDERED that Brady-Hamilton Stevedore Company's motion to intervene is granted.

IT IS HEREBY FURTHER ORDERED that Brady-Hamilton Stevedore Company's motion to admit Gordon T. Carey to appear pro hac vice is granted.

IT IS HEREBY FURTHER ORDERED that the motion of J. Fernandez to intervene is granted.[1]

IT IS HEREBY FURTHER ORDERED that the motions of R. Rothmann, J. Wagner, A. Peterson, G. Valentine, J. O'Loughlan, S. Veal, B. Peter, S. Bahnsen, J. Alavekios, T. Curtis, K. Forister, W. Bliss, L. Hathon, S. DePersis, D. Diaz, C. Kelly, E. Reed, W. E. Johnson, S. E. Littleford, R. B. Thomas, J. Walker, R. White, and Masters, Mates and Pilots Trust Funds to intervene are denied.

Dated: November 1, 1982

/s/Weigel

Judge

[1]'Fernandez' motion was granted only to the extent it dealt with wages directly due him. Although the District Court did not specifically rule on the other portion of his motion, its denial of the motions of the other seamen and the Trust Funds was obviously meant to embrace Fernandez' motion as far as concerned contributions to the Funds. [Our footnote].

Appendix D

46 U.S.C. § 953.

Preferred maritime lien; priorities; other liens

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

June 5, 1920, c. 250, § 30, Subsec. M, 41 Stat. 1004.

No. 83-1707

Office - Supreme Court, U.S.
FILED
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

R. ROTHMANN, J. WAGNER, A. PETERSON, G. VALENTINE, J. O'LOUGHLAN, S. VEAL, B. PETER, S. BAHNSEN, J. ALAVEKIOS, T. CURTIS, J. FERNANDEZ, K. FORISTER, W. BLISS, L. HATHON, S. DEPERSIS, D. DIAZ, C. KELLY, E. REED, W. E. JOHNSON, S. E. LITTLEFORD, R. B. THOMAS, J. WALKER, R. WHITE, and MASTERS, MATES AND PILOTS TRUST FUNDS,
Petitioners,

vs.

M.V. RESOLUTE, *in rem*, and COAST LINE ASSOCIATES, *in personam*, WEST WINDS, INC., NAUTICAL ELECTRIC INC., and SCHOU-GALLIS CO., LTD.
Respondents.

SUPPLEMENTAL BRIEF ON PENDING PETITION FOR CERTIORARI PURSUANT TO U.S. SUPREME COURT RULE 22.6

Of Counsel
LEONARD & CARDER
RICHARD S. ZUCKERMAN
San Francisco, CA

PROSKAUER, ROSE,
GOETZ & MENDELSOHN
New York, NY

SEHAM, KLEIN & ZELMAN
New York, NY

NORMAN LEONARD
Counsel of Record
1182 Market Street
San Francisco, CA
Tele: (415) 626-3077
Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

No. 83-1707

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

R. ROTHMANN, J. WAGNER, A. PETERSON, G. VALENTINE, J. O'LOUGHLAN, S. VEAL, B. PETER, S. BAHNSEN, J. ALAVEKIOS, T. CURTIS, J. FERNANDEZ, K. FORISTER, W. BLISS, L. HATHON, S. DEPERSIS, D. DIAZ, C. KELLY, E. REED, W. E. JOHNSON, S. E. LITTLEFORD, R. B. THOMAS, J. WALKER, R. WHITE, and MASTERS, MATES AND PILOTS TRUST FUNDS,
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M.V. RESOLUTE, *in rem*, and COAST LINE ASSOCIATES, *in personam*, WEST WINDS, INC., NAUTICAL ELECTRIC INC., and SCHOU-GALLIS CO., LTD.
Respondents.

SUPPLEMENTAL BRIEF ON PENDING PETITION FOR CERTIORARI PURSUANT TO U.S. SUPREME COURT RULE 22.6

Come now petitioners and, pursuant to U.S. Sup. Ct. Rule 22.6, 28 U.S.C., hereby file this supplemental brief to call the Court's attention to its decision in *Schneider Moving & Storage Co. v. Loran W. Robbins, et al.*, Nos. 82-1860, 82-186, ... U.S. ...., 52 U.S. Law Week 4476, 115 LRRM 3641 decided on April 18, 1984, after the petition herein had been completed and was mailed to the Clerk of this Court for filing.

In the petition it was pointed out that the failure of respondent employer to make its contributions to the Trust Funds decreases the value of the funds and thereby increases the likelihood that the petitioners-crew members would fail to receive the benefits due them and would thereby suffer a "loss of benefits". Petition for Writ of Certiorari, p. 9-10. In support of this argument petitioners relied in part on this Court's decision in *Lewis v. Benedict Coal Co.*, 361 U.S. 495 (1960) *Ibid* p. 9.

In its recent *Schneider Moving* decision, this Court determined that the trustees of multi-employer trust funds, which, like Petitioner-Trust Funds here, provide employees with pension and welfare benefits (52 U.S. Law Week 4477 nn. 6, 7, 8) may seek judicial enforcement of the trust terms against a participating employer without first submitting to arbitration an underlying dispute over the meaning of a term in the employer's collective bargaining agreement.

In reaching this result the Court pointed out that

> These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contributions from each employer. *Any diminution of the fund* caused by the arbitration requirements of a particular employer's collective-bargaining agreement *would have an*

adverse effect on the other participants.[17] The enforcement mechanisms established in the trust agreements protect the *collective interests of the parties from the delinquencies of individual employers* by allowing the trustees to seek prompt judicial enforcement of the contribution requirements.

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[17]Cf. *Lewis v. Benedict Coal Co.*, 361 U.S at 469 ("[U]nlike the usual third-party beneficiary contract, this is an industry-wide agreement involving many promisors. . . . The application of the suggested [presumption] to this contract would require us to assume that the other [employers] . . . were willing to risk the threat of diminution of the fund in order to protect those of their number who might have become involved in local labor difficulties.").

..... U.S. ....., 52 U.S. Law Week 4478 (Court's footnote; emphasis supplied).

This Court should adopt the same approach to the instant case, in which the Petitioner-MMP Trust Funds are also multi-employer funds. This Court should not permit to stand an interpretation of the Ship Mortgage Act or an application of the admiralty law's preferred lien for seaman's compensation which would result in a diminution of the multi-employer trust funds in this case. Petitioners here should be protected from the delinquencies of an individual employer as were the Trustees in *Schneider Moving*. The Court should not assume that other employers in the MMP bargaining unit are willing to risk the threat of the diminution of the Funds in order to protect the creditors of those of their number who might have become involved in financial difficulties.

The admiralty and maritime considerations adverted to in the petition as the basis for the imposition of a maritime lien in this case are equally as important as the con-

siderations which prompted this Court to reach the decision it did in *Schneider Moving*.[1]

San Francisco, California
May 10, 1984

Respectfully submitted,

NORMAN LEONARD
Counsel of Record
LEONARD & CARDER
RICHARD S. ZUCKERMAN
PROSKAUER, ROSE, GOETZ & MENDELSOHN
SEHAM, KLEIN & ZELMAN
Of Counsel

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[1] *Schneider Moving*, like this case, involved an effort to collect the contributions. Neither of these cases is like *Morrison-Knudsen Constructon Co. v. Director, OWCP*, 416 U.S. , 78 L.Ed. 2d 194 (1983) which involved only the question of whether the contributions, having been collected, were to be regarded as wages for computing compensation benefits under the Longshore and Harborworkers Compensation Act.